



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2013

Mr. Paul Taylor
Administrator
Texas Association of School Boards Risk Management Fund
P.O. Box 301
Austin, Texas 78767-0301

OR2013-21950

Dear Mr. Taylor:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 508912.

The Texas Association of School Boards Risk Management Fund (the "fund") received a request for information pertaining to specified attorney fee bills, invoices, billing statements, or itemized bills paid regarding specified types of cases and named attorneys and contracts, memoranda of understanding, or engagement letters pertaining to the hiring of law firms and scope of work in a specified type of case. You state you have released the information submitted as Exhibit B to the requestor. You claim the remaining submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered

¹Although you do not specifically raise section 552.136 of the Government Code in your brief, we understand you to raise this exception based on your markings.

your arguments and reviewed the submitted information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note you have not submitted any information responsive to the portions of the request for contracts, memoranda of understanding, or engagement letters pertaining to the hiring of law firms and scope of work in a specified type of case for our review. Thus, although you state the fund has submitted a representative sample of the requested information, we find the submitted information is not representative of all the information to which the requestor seeks access. Please be advised this open records letter ruling applies only to the type of information you have submitted for our review. This ruling does not authorize the fund to withhold any type of information that is substantially different from the types of information you submitted to this office. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public). Therefore, we presume the fund has released the information responsive to the remaining portions of the request, to the extent such information existed and was maintained by the fund when the fund received this request for information. If not, then the fund must release any such information immediately. *See id.* §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Next, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You state the fund will redact identifying student information from the submitted information pursuant to FERPA. However, we note the information submitted for our review contains additional unredacted student identifying information. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the

²We note you have submitted a list of currently open fund claims as Exhibit C, which we understand to be for informational purposes only. This ruling does not address the public availability of non-responsive information, and the fund is not required to release non-responsive information in response to this request.

³A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

We note portions of the submitted information are subject to section 552.022 of the Government Code, which provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(16). The information in Exhibit A consists of attorney fee bills subject to section 552.022(a)(16). The information in Exhibit D consists of a court-filed document subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold all of the information at issue under section 552.103 of the Government Code, and the submitted attorney fee bills under section 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information at issue may not be withheld under sections 552.103 or 552.107 of the Government Code. You also seek to withhold the submitted attorney fee bills in Exhibit A under Texas Rule of Evidence 503, which the Texas Supreme Court has held are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 for the submitted attorney fee bills in Exhibit A. We will also consider the applicability of section 552.101 of the Government Code to the court-filed document in Exhibit D. Further, because sections 552.136 and 552.130 of the Government Code make

information confidential under the Act, we will address the applicability of these exceptions to the submitted information.⁴

Next, we note the fund raises section 552.101 of the Government Code for the information in Exhibit D. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, the fund has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of the information in Exhibit D confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Furthermore, the fund states it has no authorization to release information in Exhibit D belonging to fund members, which is held by the fund. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise. As the fund raises no other arguments against the disclosure of the information at issue, the fund must release Exhibit D.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication is confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You explain that under the fund's liability program, the fund assigns attorneys to provide legal defense services to fund member school districts involved in litigation or potential litigation. You further explain that, as required by the relevant agreements governing the fund's liability program, the fund makes payments to these assigned attorneys, who submit their fee bills and invoices to the fund for payment based on services rendered to fund member school districts. Accordingly, you assert the fund acts as a representative of the client school districts, extending the attorney-client privilege to include communications with the fund. You assert portions of the submitted fee bills in Exhibit A document privileged communications between the fund as a representative of the member school districts, outside legal counsel and their representatives hired by the fund to represent the member school district, and member school district employees and officials. You state these communications were made for the purpose of facilitating the rendition of professional legal

services to the member school districts and have remained confidential. Based on your representations and our review of the information at issue, we find the fund has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the fund may withhold the information we have marked within the submitted attorney fee bills pursuant to Texas Rule of Evidence 503. However, we find the remaining information you have marked does not document a communication or documents a communication with non-privileged parties or individuals who you have not identified as privileged parties. Thus, we find you have not demonstrated how the remaining information you have marked documents an attorney-client communication for purposes of rule 503. Accordingly, the remaining information you have marked in Exhibit A may not be withheld on that basis.

We note the remaining information in Exhibit A contains motor vehicle registration information subject to section 552.130 of the Government Code. Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the fund must withhold the license plate number we have marked under section 552.130 of the Government Code.⁵

The remaining information in Exhibit A also contains account numbers subject to section 552.136 of the Government Code, which provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the fund must withhold the account numbers we have marked under section 552.136 of the Government Code. However, you have not established any of the remaining information you have marked qualifies as an account number for purposes of section 552.136 of the Government Code; thus, none of the remaining information at issue may be withheld on that basis.

In summary, the fund must release the court-filed document in Exhibit D pursuant to section 552.022(a)(17) of the Government Code. The fund may withhold the information we have marked in the attorney fee bills in Exhibit A under Texas Rule of Evidence 503. The fund must withhold the license plate number we have marked in Exhibit A under section 552.130 of the Government Code and the account numbers we have marked in

⁵We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

Exhibit A under section 552.136 of the Government Code. The fund must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Cynthia G. Tynan". The signature is written in a cursive, flowing style.

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 508912

Enc. Submitted documents

c: Requestor
(w/o enclosures)